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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-166

FIDELITY TELEVISION, INC.,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Petitioner, Fidelity Television, Inc., prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on March 6, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, while not yet officially reported, has been unofficially reported at 32 P & F *Radio Reg.* 2d 1607 (1975), and is printed in the Appendix

at page 1a.[1] The per curiam opinion of the same court on petitions for rehearing, reconsideration or clarification and suggestions for rehearing en banc and the statement of Bazelon, Chief Judge, as to why he voted to grant rehearing en banc are not yet officially reported, but are unofficially reported at 34 P & F *Radio Reg.* 2d 419 (1975), and are printed in the Appendix at page 34a. The Decision of the Federal Communications Commission is officially reported at 44 F.C.C.2d 123 (1973) and is printed in the Appendix at page 94a. The Initial Decision of the Hearing Examiner is not officially reported, but is unofficially reported at 16 P & F *Radio Reg.*2d 1181 (1969), and is printed in the Appendix at page 121a.

JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on March 6, 1975. An order denying petitions for rehearing, reconsideration or clarification was entered on June 30, 1975. An order staying the issuance of the mandate of the Court of Appeals pending the filing of a Petition for Writ of Certiorari was entered on July 21, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Does the interpretation of the First Amendment requirement of diversification of the media by the F.C.C. and the Court of Appeals in this case comport with the prior decisions of this Court?

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[1] References to the Appendix are indicated as "(A. ___)".

2. Where it was found that the renewal applicant and its parent company had engaged in prohibited reciprocal trade practices, did the F.C.C. act arbitrarily in finding that such conduct neither disqualified the renewal applicant nor reflected adversely upon its character so as to require the assessment of a comparative demerit?

3. Was the competing applicant denied due process of law where allegations were made against it in petitions to enlarge the issues, where the petitions were denied by the Commission so that no hearing on the allegations was held, and where the Commission then used the allegations in the petitions as a basis for a decision adverse to the competing applicant?

4. In a comparative broadcast license renewal case, does the Communications Act permit the granting of a preference for the factor of "continuation of existing service" apart from any credit which may be given for the past performance of the renewal applicant?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional provisions and statutes are involved herein:

The First Amendment to the United States Constitution:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Communications Act of 1934, as amended, 47 U.S.C., which provides as follows:

"Sec. 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and periods of the license. . . ."

* * *

"Sec. 304. No station license shall be granted by the Commission until the applicant therefor shall have signed a waiver of any claim to the use of any particular frequency or of the ether as against the regulatory power of the United

States because of the previous use of the same, whether by license or otherwise."

* * *

"Sec. 307(d). No license granted for the operation of a broadcasting station shall be for a longer term than three years and no license so granted for any other class of station shall be for a longer term than five years, and any license granted may be revoked as hereinafter provided. Upon the expiration of any license, upon application therefor, a renewal of such license may be granted from time to time for a term of not to exceed three years in the case of broadcasting licenses and not to exceed five years in the case of other licenses, if the Commission finds that public interest, convenience, and necessity would be served thereby."

* * *

"Sec. 309(h). Such station licenses as the Commission may grant shall be in such general form as it may prescribe, but each license shall contain, in addition to other provisions, a statement of the following conditions to which such license shall be subject: (1) The station license shall not vest in the licensee any right to operate the station or any right in the use of the frequencies designated in the license beyond the term thereof nor in any other manner than authorized therein; . . ."

* * *

"Sec. 313(a). All laws of the United States relating to unlawful restraints and monopolies and to combinations, contracts, or agreements in restraint of trade are hereby declared to be ap-

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plicable to the manufacture and sale of and to trade in radio apparatus and devices entering into or affecting interstate or foreign commerce and to interstate or foreign radio communications. Whenever in any suit, action, or proceeding, civil or criminal, brought under the provisions of any of said laws or in any proceedings brought to enforce or to review findings and orders of the Federal Trade Commission or other governmental agency in respet of any matters as to which said Commission or other governmental agency is by law authorized to act, any licensee shall be found guilty of the violation of the provisions of such laws or any of them, the court, in addition to the penalties imposed by said laws, may adjudge, order and/or decree that the license of such licensee shall, as of the date the decree or judgment becomes finally effective or as of such other date as the said decree shall fix, be revoked and that all rights under such license shall thereupon cease: PROVIDED, HOWEVER, That such licensee shall have the same right of appeal or review, as is provided by law in respect of other decrees and judgments of said court."

STATEMENT OF THE CASE

This case involves a comparative hearing before the Federal Communications Commission (hereinafter "the Commission") between RKO General, Inc. ("RKO"), a license renewal applicant for KHJ-TV, Channel 9, Los Angeles, California, and Fidelity Television, Inc., ("Fidelity"), an applicant for a construction permit for a new commercial television station to be operated on the same channel.

RKO is a subsidiary of General Tire & Rubber Company and licensee of *AM*, *FM*, and *TV* stations serving New York City, Los Angeles, Boston, Detroit, and Memphis, and of *AM* and *FM* stations serving Washington, D.C., and San Francisco. It also controls *CATV* franchises serving almost 100 cities and towns across the country. (A. 58a)

Fidelity is composed of 20 prominent citizens of southern California and has no media interests apart from its application to the F.C.C.[2]

The two mutually-exclusive applications were filed in 1965, and following designation by the Commission in June, 1966, a hearing was held on the standard comparative issue of which applicant would better serve the public interest.

During the hearing, on March 2, 1967, the Department of Justice filed suit in the United States District Court for the Northern District of Ohio against the General Tire & Rubber Company, Aerojet General Corporation, A. M. Byers Company, and RKO, the latter three companies all subsidiaries of General Tire, alleging that the four companies had violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, by engaging in coercive and mutual patronage reciprocity.

The record in the F.C.C. comparative hearing was closed on June 15, 1967, and then reopened to receive evidence concerning the anti-competitive practices of KHJ-TV, after which it was finally closed on August 26, 1968. The antitrust case against General Tire and its subsidiaries was ultimately concluded by a consent decree on October 21, 1970.

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[2] One 3% stockholder of Fidelity has a 10% interest in a *CATV* franchise 50 miles from Los Angeles. (A. 59a).

In his Initial Decision, released August 13, 1969, the F.C.C. Hearing Examiner[3] held that RKO's "on-the-air operation miserably failed to serve the public interest," and that RKO had engaged in business practices (reciprocity) which suggested "several licensee qualification disabilities." (A. 276a). He preferred Fidelity due to its "marked superiority over General Tire in the areas of local ownership, diversification of mass communications media, and favorable survey and poll support." (A. 280a). RKO's application was denied and Fidelity's granted. RKO filed exceptions with the Commission. While the case was pending before the Commission, the Department of Justice filed a brief urging disqualification of RKO if the Commission agreed with the facts found by the Hearing Examiner.

Over four years after the Initial Decision, on December 6, 1973, and after Fidelity was compelled to go to the District of Columbia Circuit Court of Appeals twice on petitions for writs of mandamus[4] to force the Commission to decide the case (with KHJ-TV continuing to operate the station all the while), the Commission released its decision reversing the Hearing Examiner and granting RKO's application for renewal of its license for KHJ-TV.[5] (A. 109a).

In its decision, the Commission adopted the Hearing Examiner's findings of facts with few exceptions, but substituted its conclusion for the Examiner's. (A. 109a). It first held that there was no reason either to disqualify RKO or to assess a comparative demerit against RKO for its involvement in anticompetitive trade practices. (A. 100a-101a)

[3] Now known as "Administrative Law Judge."

[4] *See* Fidelity Television, Inc. v. F.C.C., 502 F.2d 443 (D.C. Cir. 1974).

[5] Only two of the seven Commissioners (Robert E. Lee and Charlotte Reid) joined in the decision. Chairman Burch concurred in the result. Two Commissioners (Johnson and H. Rex Lee) dissented and issued statements. Two Commissioners (Wiley and Hooks) did not participate. (A. 94a).

Secondly, the Commission purported to apply the criteria of the *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), to the facts of record and concluded that KHJ-TV's past broadcast record was average, rather than poor as found by the Hearing Examiner, thus warranting neither a preference nor a demerit. (A. 104a). In this regard, the Commission refused to evaluate the quality of individual programs, but proceeded to counterpose the public's expressed satisfaction with RKO's programming against its expressed dissatisfaction. The Commission also attached weight to KHJ-TV's local origination of some cultural and artistic programming, to its compliance with the Television Code of the National Association of Broadcasters, and to the fact that KHJ-TV had no network affiliation; but minimized the continuously unfavorable public reaction to much of KHJ-TV's programming. (A. 103a-104a)

Thirdly, under the factor of diversification of control of the mass communications media, the Commission effectively ignored RKO's vast media holdings, including television, *AM*, and *FM* stations in Los Angeles, and concluded that neither applicant was entitled to a preference under this criterion. In reaching this conclusion, the Commission underlined that there was "no evidence . . . of any attempt by RKO to influence the operation of KHJ-TV in such a way as to promote any national or other uniform expression of political, economic, or social opinion. . . ." (A. 104a-105a)

Lastly, the Commission concluded on the factor of participation in station operation that neither applicant was entitled to a preference under this criterion, even though Fi-

delity proposed 22.66% full-time integration and substantially more part-time integration of its local stockholders, whereas RKO had none. In minimizing Fidelity's acknowledged quantitative advantage, the Commission stated that the qualitative aspects of Fidelity's proposal "neutralized" the quantitative. (A. 107a) The Commission further equated RKO and Fidelity by contending that both applicants would rely on a professional staff, that Fidelity's principals lacked broadcast experience that KHJ-TV's had acquired, and that RKO gave great autonomy to KHJ-TV's staff in operating the station. (A. 107a).

The Commission ultimately concluded that RKO was the preferred applicant, since credit must be given in a comparative renewal hearing, where the applicants are otherwise equal, for the value to the public in the continuation of the existing service. (A. 108a-109a)

On March 6, 1975, the United States Court of Appeals for the District of Columbia Circuit issued its opinion affirming the Commission's decision.[6] (A. 1a). With respect to the reciprocal trade practices issue, the Court of Appeals asserted that the "antitrust law on reciprocity is not entirely settled." (A. 21a). It characterized some of RKO's practices as "unilateral, unsuccessful attempt[s] at reciprocity," (A. 22a), and expressed doubt as to whether an antitrust violation flowed therefrom. The court also found instances of successful reciprocity, but minimized their import because "[m]ost of these [instances] have little to do with RKO, and even less with KHJ[-TV]...." (A. 22a). The court recognized that the practice under attack was "affirmatively declared illegal" in 1966 in the

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[6] Jurisdiction obtained under Section 402 of the Communications Act of 1934, 47 U.S.C. § 402.

General Dynamics case, 258 F.Supp. 36, (S.D.N.Y. 1966), (A. 23a), yet it devaluated the precedential impact of this case because a merger had been involved there but not here.

As to KHJ-TV's past broadcast record, the court refused to conclude "that the Commission's decision that programming performance was 'average' [was] bereft of the support of substantial evidence," (A. 28a), yet it readily acknowledged that there was nothing superior about KHJ-TV's past record. On the basis of this evaluation—one notably replete with negatives—the court supported the Commission's determination.

On the integration factor, the court concluded that while "RKO's local interest performance was [not] any better than Fidelity's could be predicted to be on the basis of the challenger's integration proposal," (A. 30a), it would not "overrule the Commission's finding that it was no worse." (A. 30a).

With respect to diversification, the court concluded that although Fidelity had far fewer media interests than did RKO, a comparison is not based solely on the quantitative. (A. 30a). The court found there to be substantial evidence of RKO's ability to present diverse views over its radio and television stations and in its newspapers, (A. 31a), and the basis of the Commission's decision found support in its previous decisions, "[alt]hough the Commission has vacillated over the years in its general approach to diversification." (A. 31a).

Finally, the court ultimately concluded that "Fidelity and RKO were essentially equally poor contenders —or, at the best, both were minimally acceptable applicants." (A. 31a). The court refused to hold, despite the foregoing professed "equality," that the Commission legally erred in

preferring the incumbent on the sole basis that it was the incumbent, and that as such, its "minimal service" was to be preferred to "no service at all." (A. 31a-32a). The court thus did attach legal weight to RKO's "renewal expectancies," in spite of the fact that its words belied its actions.

On March 27, 1975, Fidelity petitioned the Court of Appeals for a rehearing or clarification of its decision, and Citizens Communications Center, a public-interest law firm, filed a petition in support as amicus curiae.

On June 30, 1975, the court issued a per curiam order denying Fidelity's (and Citizens Communications Center's) petitions. Accompanying this order was a lengthy statement by Chief Judge *Bazelon* as to why he voted to grant an en banc rehearing (A. 39a).

REASONS FOR GRANTING THE WRIT

I. The F.C.C. and the Court of Appeals Have Seriously Undercut the First Amendment as Applied by This Court to Broadcasting

In an extensive discussion of the applicability of the First Amendment to broadcasting in *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969), the Court said:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."

The basic structure of this First Amendment "marketplace of ideas" had been previously enunciated in *Associated Press*

v. United States, 326 U.S. 1, 20 (1945), where the Court had stated that the First Amendment–

> "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."

The need for diverse and antagonistic *sources* of news and information is the cornerstone of this Court's application of the First Amendment to broadcasting, as well as to the resultant F.C.C. policy on diversification of the media of mass communications. *See Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C. 2d 393 (1965). Thus the statutory and regulatory scheme has long been directed to the promotion of diversification of the *ownership* of the broadcast media. *See, e.g., Amendment of Rules Relating to Multiple Ownership of AM, FM and Television Broadcasting Stations*, 18 F.C.C. 288, 291 (1953); *TV 9, Inc. v. F.C.C.*, 495 F.2d 929, 938 (D.C. Cir. 1973); *Citizens Communications Center v. F.C.C.*, 447 F.2d 1201, 1213 n. 36 (D. C. Cir. 1971); *McClatchy Broadcasting Co. v. F.C.C.*, 239 F.2d 15 (D.C. Cir. 1956); *Johnston Broadcasting Co. v. F.C.C.*, 175 F.2d 351 (D.C. Cir. 1949).

In this case, for the first time, the F.C.C. and the Court of Appeals have effectively emasculated the First Amendment policy on diversification of the ownership of the mass media by equating diverse ownership to common-ownership-with-autonomous-operation. By so doing, the Commission and the court have rejected the principle, long and vigorously defended by this Court, that the only way to assure free, robust, and open debate on public matters is to require that the public's *sources* of news and information be diverse and antagonistic. Such a fundamental change in the law affecting the First Amendment rights of

the public, a change moving inexorably in the direction of monopoly ownership of the media, should be reviewed by this Court.

The circumstances under which this question is raised are not complicated. The record shows that RKO is the licensee of five major-market *VHF* television stations, seven *AM* radio stations, and seven *FM* stations. It is a corporate media conglomerate with controlling interests in a great many *CATV* systems as well as microwave communications facilities, movie theatres, and programming and advertising services. (A. 104a). Fidelity has no media interests apart from the application involved in this case.[7] Yet in a purported but incomprehensible comparison between the two on the issue of diversification of the media of mass communications, the Commission found that neither party was entitled to a preference over the other. (A. 105a).

To reach this result, the Commission referred to several factors which allegedly ameliorate the effect of multiple ownership—factors which have sometimes been considered in determining the weight to be attached to a diversification preference but which have not heretofore been considered significant enough to prevent a party without media interests from obtaining such a preference. These include the number of other media facilities serving the community in question, the fact that RKO's media ownership is not in violation of the Commission's multiple ownership

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[7] One 3% stockholder of Fidelity has a 10% interest in a *CATV* franchise. The Commission's reference to the alleged interest of another Fidelity stockholder in a corporation which publishes advertising throw-aways, erroneously referred to as "newspapers" by the Commission, was rejected by the court below and is not at issue here. (A. 105a)

rules, that renewal of KHJ-TV's license would not increase the concentration of media ownership in any way, and the Commission's preference for rulemaking for across-the-board changes inthe ownership pattern of the broadcast industry. (A. 104a-105a). *See, e.g., Policy Statement on Comparative Broadcasting Hearings, supra; Johnston Broadcasting Co. v. F.C.C., supra; McClatchy Broadcasting Co. v. F.C.C., supra.*

However, the Commission relied heavily on one factor new to the diversification analysis, the fact that there was no showing of any attempt to use KHJ-TV to promote a particular political, economic, or social opinion, nor any undesirable pattern in the station's public affairs programming. (A. 105a).

The Court of Appeals in affirming the Commission's decision acknowledged that if "quantitative" diversification were the basis of comparison, Fidelity should have received a preference on this point. However, the court went on to discover in prior cases that there is also such a thing as qualitative diversification:

> "whether the licensee has in the past met the goals of diversification by operating his stations autonomously and independently."

(A. 30a). On this basis the court affirmed the Commission's determination that Fidelity, with no other media interests, was not entitled to any preference for diversification over RKO, with its 19 major-market broadcasting licenses.

There has never been any such notion as "qualitative" diversification recognized in the prior cases so as to neutralize the impact of multiple media holdings under the diversification issue, as Chief Judge *Bazelon* shows in his discussion of the only two cases cited by the court in support of this dubious proposition (A. 64a-65a).

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The effect of this change in the law is profound and disturbing. If autonomous *operation* of commonly owned media facilities is equivalent in the eyes of the law to diverse ownership, the last barrier to monopoly ownership of the media has fallen. If autonomous operation can prevent a diversification preference in a comparative hearing for a party with no media interests, surely it can be a basis for a waiver of the Commission's Multiple Ownership Rules to permit multiple licensees to obtain additional stations. After all, it is now a judicially sanctioned interpretation of the diversification requirement of the First Amendment.

This change in the law is further contrary to the First Amendment because it shifts the regulatory focus from the objective fact of ownership to the sensitive area of program content, and even beyond that to the substance of the views and opinions expressed over the air. How is a competing applicant to obtain a preference for diversification in the future? Any practitioner before the Commission knows the answer to that. Comparing media facilities owned by the applicants is no longer enough. The competing applicant must now analyze the views and opinions expressed on the commonly owned stations to discern whether there is a pattern. Then there must be inquiry–presumably at the hearing–as to *why* these common views were expressed–for there will inevitably be common viewpoints taken.

The question then is whether the common views were imposed by higher management in the corporate structure, or whether they were separately generated and just coincidentally happened to be voiced over the commonly owned stations. How much impact by higher management is permissible? After all, the licensee is responsible for the station and everyting that goes out over the air except political

programming. What is an "undesirable pattern in the station's public affairs programming"? Undesirable in whose eyes? The Commission's?

The Commission and the Court of Appeals have seriously eroded this Court's First Amendment policy in the broadcasting field, and they have shifted the focus of inquiry from the objective fact of ownership to the previously protected area of the nature of the news and opinions expressed over the air. This significant change in the law governing diversification of the media raises important First Amendment problems and should be reviewed by the Court.

II. It Was an Unlawful Abuse of Discretion for the Commission to Refuse to Assess at Least a Comparative Demerit Against RKO for Engaging in Anticompetitive Reciprocal Trade Practices in the Sale of Time on KHJ-TV and Its Other Stations.

In his Initial Decision, the Hearing Examiner set forth twenty pages of detailed findings concerning the reciprocal trade practices of KHJ-TV, RKO, and its parent company, General Tire (A.231a-262a). He summed up the theme of these practices concisely: "you buy from me–I buy from you." (A. 269a). Prescinding from the question whether these documented practices constituted violations of the antitrust laws, the enforcement of which is not the Commission's primary concern, the Examiner focused on the area which is the Commission's responsibility, and in which its expertise lies, *i.e.*, regulation of the broadcasting industry in the public interest.

The Examiner pointed out the injury done to the public when these reciprocal trade practices are applied to

broadcasting. The principal incentive for meritorious programming is to enable a station to obtain a large audience, which results in the sale of advertising. When the sale of advertising is accomplished through reciprocal practices—when Pepsi-Cola buys advertising on General Tire's stations because General Tire places Pepsi-Cola in its tire manufacturing plants (A. 252a-257a)—a station can ignore the public, as the Examiner found KHJ-TV largely had done in its programming (A. 266a-267a). As the Examiner stated:

> "What stimulus is there for station ownership, management or personnel to expend energy and risk shrinking ownership's purse, in attempting to program a station in meritorious fashion, when all concerned know that the advertising with which the programming is to be associated can be disposed of through inducements largely irrelevant to program quality?" (A. 272a).

The Examiner found that RKO's reciprocal practices suggested several licensee qualification disabilities from the point of view of the public interest. (A. 270a). The Justice Department, viewing the evidence of RKO's reciprocal practices from the point of view of the antitrust laws, and finding that such laws had been violated, filed an *amicus* brief urging that if the Commission upheld the Examiner's findings of fact, RKO's renewal application should be denied. (A. 96a)

The Commission did not disturb the Examiner's findings of fact. It stated:

> "[W]e do recognize that KHJ-TV was involved in a number of mutual patronage situations during this period, as would be normal for any separate entity of a large conglomerate such as General Tire. Thus the question here is not whether

> reciprocal dealing was practices with respect to KHJ-TV, but whether this conduct should reflect adversely upon the operation of the station."[8] (Footnote omitted.) (A. 100a)

The Commission concluded that the reciprocal practices did not reflect adversely upon the station. It did so without referring to the effect of these practices on the broadcasting business or the public, but by rejecting the Justice Department's position concerning the application of the antitrust laws. The Commission excused RKO's reciprocal practices on the ground that "the relevant legal and economic concepts were in a state of flux at the time"; that accordingly RKO cannot be charged with "knowing and wilfull misconduct"; that many other corporations engaged in similar conduct during this period; and that the consent decree which terminated the civil antitrust suit was essentially prospective in nature (A. 101a).

The Court of Appeals did not feel compelled to overturn the Commission's interpretation of the antitrust laws. (A. 23a-24a). No mention was made of broadcasting. Chief Judge *Bazelon*, in his Statement, after analyzing the Court's discussion, concludes: "The holding on this issue is truly extraordinary." (A. 75a)

As the Chief Judge notes, the record establishes that successful mutual patronage reciprocity was engaged in with Pepsi-Cola, Olin Mathieson, Alcoa, American Airlines, and

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[8] It is interesting to note that the Commission considers mutual patronage situations "normal" for a station which is part of a large conglomerate. In this connection it must be remembered that this is the same station which the Commission exculpated from the strictures of the diversification policy on the basis of autonomous and independent operation.

Hertz, that resulted in significant increases in KHJ-TV's revenues. These acts clearly violate Section 5 of the Federal Trade Commission Act and, at least after 1965, violate the Sherman Act (A. 71a-72a) However, assuming, *arguendo*, that RKO's reciprocal practices were not technically a violation of the antitrust laws, they were clearly destructive of the basic economic underpinnings of the nation's system of broadcasting. For the Commission and the court totally to ignore the effect of this conduct on KHJ-TV as a broadcasting station, especially after the Examiner in his decision had focused upon it, was an unlawful abuse of discretion warranting review by this Court. On the basis of this record KHJ-TV should be disqualified as a broadcaster, as the Examiner suggested, or certainly be assessed a major comparative demerit, irrespective of whether it is technically guilty of violating the antitrust laws. The public interest standard of the Communications Act has here been reduced to the standard of the criminal law under a holding that anticompetitive reciprocal trade practices do not reflect adversely upon RKO as a broadcast licensee in any way because it has not been proved that this was "knowing and willful misconduct." The Court should review this denigration and diminution of the public interest standard.

III. Fidelity Was Denied Due Process of Law Where Allegations Were Made Against It in Petitions to Enlarge the Issues, Where the Petitions Were Denied by the Commission with the Result That No Hearing Was Held on the Allegations, and Where the Allegations Were Then Used Against Fidelity in the Commission's Decision.

After the Initial Decision, the Commission's Broadcast Bureau filed a petition to enlarge the issues against Fidelity to inquire into the circumstances surrounding the preparation, signing and filing of stock subscription agreements, amendments of its application, and affidavits. Fidelity opposed the petition and it was denied by the Commission (22 F.C.C. 2d 737). Thereafter, RKO filed a petition to dismiss Fidelity's application, alleging a number of deficiencies involving an amendment filed by Fidelity. Fidelity filed its opposition. The Commission denied the petition and declined to remand the proceeding for a hearing into the allegations made (F.C.C. 71-973).

Then, however, in its Decision, the Commission used these two allegations against Fidelity to deny it a comparative preference to which it was unquestionably entitled on the factor of participation of owners in management of the station. (A. 105a-106a)

Two aspects of this matter are significant. First, the allegations had nothing to do with the factor of integration of ownership and management. The allegations related to Fidelity's compliance with the Commission's reporting requirements, not the integration issue. The Commission, however, used these allegations to reflect adversely on Fidelity's character–its intent to live up to its integration proposal– and found that Fidelity could not be relied upon in this regard.

The second aspect of this matter which requires attention is the fact that Fidelity has been found to have character deficiencies without ever being given an opportunity to defend itself against the charges in a hearing. Commissioner H. Rex Lee stated the matter concisely in his dissent:

> "The majority cannot have it both ways. It cannot reject or dismiss requests for hearing issues and then use the questions raised by the requests against the applicant in the comparative evaluation." (A. 118a).

That, however, is precisely what the Commission did here to deny Fidelity a preference on the factor of integration of ownership and management.

The Court of Appeals did not address this question, which was raised in Fidelity's brief. (*See* Chief Judge *Bazelon's* Comment at A. 67a). Instead the Court constructed its own justification for denying Fidelity a preference on the factor of participation of ownership in management, Fidelity's lack of broadcast experience. However, the Commission itself had rejected that analysis in its *Policy Statement On Comparative Broadcast Hearings*, 1 F.C.C.2d 393 (1965), where the conflict between favoring diversification of the media on one hand and broadcast experience on the other was addressed. "Since emphasis upon this element [broadcast experience] could discourage qualified newcomers to broadcasting, and since experience generally confers only an initial advantage,[8] it will be deemed of minor significance." (1 F.C.C.2d at 396) Footnote 8 to the above passage states, "Lack of experience, unlike a high concentration of control, is remediable. See Sunbeam Television Corp. v. Federal Communications Commission, 100 U.S.App.D.C. 82, 243 F.2d 26." (The Court of Appeals' emphasis on broadcast experience in this con-

text is further evidence of a prostitution of this Court's First Amendment policy of diversification of the media.)

The Commission's denial of administrative due process to Fidelity should be reviewed by this Court.

The Grant of a Comparative Preference to a Renewal Applicant for the Fact that It is Operating on the Frequency, Apart from the Merit of Its Past Performance, Violates Sections 301, 304, 307(d) and 309(h) of the Communications Act of 1934.

In his Initial Decision, the Hearing Examiner found the programming performance of KHJ-TV to be "miserable" and in effect gave RKO a demerit for its reciprocal anti-competitive trade practices. In proposing a grant of Fidelity's application, the Examiner granted preferences for diversification of the media, local ownership, and community surveys. Nonetheless, the Commission, through a herculean effort, raised KHJ-TV's programming performance from poor to average, thus avoiding the virtual necessity of denying its application in the face of a fully-qualified competitor,[9] which Fidelity unquestionably was, and thereby necessitating a comparison of the two applicants on other factors.

As we have seen, the Commission then washed out the strong preference for diversification to which Fidelity was entitled under the First Amendment as heretofore interpreted, and the preference for participation of local ownership in management to which Fidelity was also entitled, by crediting unsupported allegations which it has

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[9] *See* Citizens Communications Center v. F.C.C., 447 F.2d 1201 (D.C. Cir. 1971).

previously rejected as not being of decisional significance.[10] It refused to assess any demerit against RKO for its reciprocal trade practices and thus–*Eureka!*– the parties were equal.

Having concluded that neither party was entitled to any preferences or any demerits on any of the issues, the Commission decided to grant the renewal application of RKO on the ground that credit must be given "for the value to the public in the continuation of the existing service." (A. 108a). The Court of Appeals, suddenly grown strangely timid after having castigating the Commission for the deliberate delaying tactics employed in this case, saw nothing wrong in this. The Court stated:

> "We merely confirm what we intimated in the Greater Boston Television Corporation case–that, when faced with a fairly and evenly balanced record, the Commission may, on the basis of the renewal applicant's past performance, award him the license. 444 F.2d at 854, 859."

However, that is demonstrably not what the Commission did here. The Commission found KHJ-TV's past performance only average, and as such not entitled to any preference toward renewal. The Commission expressly stated:

> "Under these circumstances, we are persuaded that there are sufficient good points to offset the less

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[10] In the course of its various rulings, the Commission managed to heap an undue amount of scorn upon Fidelity, undoubtedly because Fidelity had developed the presumptively bad habit over the years of waiting for a decision, of going to the Court of Appeals in an effort to expedite the proceeding.

> favorable aspects of KHJ's performance and that, on balance, its record must be deemed to be within the bounds of average performance expected of all licensees, thus *warranting neither a preference nor a demerit.*" (Emphasis supplied.) (A. 104a)

What the Commission did was to give KHJ-TV a preference for the *fact* that it was operating on the frequency, not for the quality of its past performance. Any preference on the latter ground had been expressly rejected.

A preference based on the fact of past operation on the frequency–mere incumbency– without more, is contrary to the Communications Act. Sections 301, 304, 307(d) and 309(h)(1) of the Act clearly indicate that a licensee is to have no rights in the frequency beyond the term of the license. The granting of a preference based solely on the fact of incumbency, entirely apart from the quality of the licensee's performance, on its face constitutes the granting of a right in the frequency which is forbidden by the statute. The Commission acknowledges as much by stating that "recognition must be given to the rights and expectancies of an ordinary renewal applicant." However, by law the Commission is forbidden to recognize any such rights. *Citizens Communications Center v. F.C.C.*, *supra* at 1207; *see also* A. 50a-57a. The Court should review this important question of the interpretation of this federal statute which on its face prohibits the course of action followed by the agency in this case.

V. Conclusion

The Commission and the Court of Appeals have watered down the First Amendment rights of the public in broadcasting; they have condoned anticompetitive practices on the part of a licensee in derogation of its public trust; they have denied a competing applicant an elementary aspect of due process of law; and they have granted a preference to a renewal applicant which is prohibited by the Communications Act of 1934. This Court should grant review on Certiorari.

Respectfully submitted,

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